

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AIRE BON ASSOCIATES	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Aire Bon Associates, 17 Bon Aire Circle, Suffern, New York 10901, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 806332).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on September 14, 1989 with all briefs submitted by January 22, 1990. Petitioner appeared by Lapatin, Lewis, Green & Kaplan, P.C. (Benjamin Lewis, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioner has established that penalties asserted for failure to timely file certain returns and timely remit tax due should be abated.

FINDINGS OF FACT

Petitioner, Air Bon Associates, was the sponsor of a plan to convert to cooperative ownership the premises known as Bon Aire Park Cooperative I. On or about July 13, 1982, petitioner filed the offering plan and began sales of the cooperative units. Petitioner sold approximately 75 percent of the units prior to March 28, 1983 which was the effective date of the tax on the gains from the transfer of real property. All of the units were sold by the end of 1984 or the beginning of 1985.

In February 1987, the Division of Taxation ("Division") commenced a field audit which

led to the conclusion that petitioner sold 10,615 shares, allocable to 42 cooperative apartment units, which were subject to real property gains tax. On June 30, 1988, on the basis of the audit, the Division issued a Statement of Proposed Audit Adjustment which stated that tax was due in the amount of \$238,231.00 plus penalty of \$83,381.00 and interest of \$128,622.85 for a total amount due of \$450,234.85. On or about August 11, 1988, petitioner remitted \$366,854.00 to the Division representing the tax and interest asserted to be due. However, petitioner objected to the imposition of penalty and interest penalty. In response, the Division issued a Notice of Determination of Tax Due under Gains Tax Law, dated October 20, 1988, which stated that penalty and interest penalty were due in the amount of \$83,381.00. This proceeding followed.

The offering plan and eight subsequent amendments to the plan were prepared by a law firm. The filing dates for these amendments ranged from March 31, 1982 through October 23, 1984.

Although petitioner's law firm remained active as its counsel after March 28, 1983, it never advised petitioner of its liability for gains tax on the transfers in issue. Petitioner became aware of the tax on gains from real property transfers in 1984. However, it did not file returns on the transfers in issue because it was under the impression that, since the offering plan was filed prior to the enactment of the Gains Tax Law, the transfers were exempt from tax. In reliance upon its law firm, petitioner did not make any effort to contact the Division to find out if its understanding was correct.

The conversion of Bon Aire Park Cooperative I was the first cooperative conversion petitioner engaged in.

Subsequent to the enactment of the Gains Tax Law, petitioner filed six additional offering plans for either cooperative conversions or condominiums. With the exception of one offering plan where there was a disallowance of some expenses, each of the returns was accepted as filed. Petitioner's law firm prepared two or three of the subsequent offering plans and advised petitioner with respect to the tax due on each of the subsequent offerings.

SUMMARY OF PETITIONER'S POSITION

It is petitioner's position that it has shown that its failure to file was due to reasonable cause and not willful neglect. Relying upon regulations and cases involving other taxes for illustration, petitioner asserts that penalty should be waived. Petitioner also argues that the case of Mayblum v. Chu, (67 NY2d 1008, 503 NYS2d 316) illustrates that at one time there was confusion about when the taxable event occurred where there was a cooperative conversion. It is petitioner's assertion that it operated under the honest belief that because the transaction straddled the effective date of the gains tax statute it was exempt from tax.

Briefly, it is the Division's position that the reliance on counsel does not establish reasonable cause for the waiver of penalty. The Division also argues that petitioner's belief that this conversion was not subject to tax is at conflict with the case law and the Division's articulated policy.

CONCLUSIONS OF LAW

A. Tax Law § 1446.2(a) provides, in part, as follows:

"Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty.... If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty."

B. Initially, it is noted that reliance on the advice of counsel does not, of itself, establish reasonable cause (Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121). Rather, it has been held that the reasonableness of a taxpayer's position must be evaluated by a comparison to the Division's articulated policy (see, e.g., Matter of Birchwood Associates, Tax Appeals Tribunal, July 27, 1989). Therefore, petitioner's reliance on cases involving other taxes does not provide any support for petitioner's position.

C. In August 1983, the Division issued Publication 588, "Questions and Answers--Gains Tax on Real Property Transfers." Question and answer 20 provided a detailed explanation of the application of gains tax to cooperative conversions. In November 1984, the Division issued revised Publication 588 which again provided an explanation of the application of gains tax to cooperative conversions. These guidelines were adopted as regulations on September 24, 1985

(20 NYCRR 590.33).

On May 11, 1984, the trial court's decision in Mayblum was issued upholding the Division's position that the transfer of shares issued pursuant to a cooperative apartment conversion plan was a taxable event pursuant to Article 31-B of the Tax Law. On March 14, 1985, the Appellate Division affirmed the trial court's decision (Matter of Mayblum v. Chu, 109 AD2d 782, 486 NYS2d 89). On May 13, 1985, the Court of Appeals reached the same conclusion except with respect to the transfer of shares in a cooperative pursuant to a written subscription agreement entered into prior to the effective date of the Gains Tax Law (Matter of Mayblum v. Chu, 67 NY2d 1008, 503 NYS2d 316).

Each of the foregoing statements are contrary to petitioner's position. Nevertheless, petitioner did not remit the tax due until August 11, 1988. In view of the foregoing, petitioner's reliance on its position, despite the authority to the contrary, does not establish reasonable cause (see, Matter of Birchwood Associates, supra).

D. The petition of Aire Bon Associates is denied and the Notice of Determination of Tax Due under Gains Tax Law, dated October 20, 1988, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE